

**The Judicial System of Bosnia-Herzegovina:  
Between Courts and Politics**  
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**I. Introduction**

In this paper, I will try to analyze the judicial system of Bosnia-Herzegovina, focusing on the interaction between the judiciary and the political system.

In order to understand the distinctive traits of the judicial system, it is necessary to start with a general overview of the political context. In fact, the multi-level governance of the country deeply affects either the structure or the functioning of the judiciary in Bosnia.

Then, I will move to the analysis of the judicial system, trying to highlight its complexity and peculiarity. In Bosnia-Herzegovina, different judicial systems co-exist within one state, creating a condition of judicial fragmentation, confusion and hence a need of harmonization in civil, administrative and criminal matters. I will also concentrate on the issue of judicial independence and on the solutions that the country and the various international actors (EU Commission, OSCE, UN) are proposing to deal with it. Moreover, it is essential to understand the obstacles that the judicial system had to overcome in the past and the challenges it will have to face in the future, especially considering the perspective of European integration.

In the third section of the paper, I will examine two judicial cases that clearly exemplify the interaction between courts and politics in Bosnia. I have chosen two particular decisions, one made by a national court and another by a supranational court. The first decision on the “Constituent Peoples case” was made by the Constitutional Court of Bosnia-Herzegovina in 2000. This historical decision led to a multi-ethnic conception of the State, trying to promote the integration and not segregation of the different ethnic groups in the country. On the contrary, the second case was not so successful. In fact, the decision made by the European Court of Human Rights on the “Sejdić-Finci case” in 2009 still remains unimplemented. The ECtHR stated that the government should move towards the integration of the ethnic minorities in the highest offices of the political life of Bosnia, at the moment still excluded.

Finally, in the conclusion I will trace some interpretations, explaining why it is not possible to talk about “judicialization of politics” in Bosnia and why it is difficult to distinguish between legal and non-legal models of judicial decision-making.

## II. The political system

### *General background*

Bosnia-Herzegovina has one of the most complex and fascinating political system in the world. Its functioning and origin are the keys to understand everything about Bosnia, especially its political and social issues.

Bosnia-Herzegovina was one of the six republic of the former Socialist Federal Republic of Yugoslavia (SFRY), along with Slovenia, Croatia, Serbia, Macedonia, Montenegro. After the dissolution of Yugoslavia in 1991-92, Bosnia was devastated by a bloody inter-ethnic conflict that lasted until 1995, with the sign of the Dayton Peace Agreement (DPA). It designed a complex constitutional architecture, still affecting the social and political life of the country. One of the annexes of the agreement (annex 4) is the Constitution of Bosnia-Herzegovina, that defines the State as composed of two entities (the Federation of Bosnia-Herzegovina and the Republika Srpska) and of Brčko District. Having a consociational nature, it designed a very decentralized political system with four levels of government, each having law-making powers: one state, two entities, ten cantons in the Federation, and Brčko District.

According to the last census (2013), the main ethnic groups in the country are: Bosniak (Muslims, 50%), Serbs (Christian Orthodoxes, 31%), Croats (Catholics, 15%). The Preamble of the Constitution defined these three ethnic groups as “constituent peoples” and identifies a residual category knowns as “Others” (4%), that are ethnic minorities (such as Jews and Roma), citizens having ethnically mixed backgrounds and those who refuse to identify themselves according to their ethnicity.

One essential aspect to take always into account is that the constitutional system was not created on the basis of equality of individuals, but on the equality of ethnic groups. In this perspective, the distinction between constituent peoples and “Others” is significant, because only constituent peoples are entitled to special collective rights, such as representation in institutions and veto powers in decision-making processes.<sup>1</sup>

### *Central state institutions*

The Presidency of Bosnia-Herzegovina represents the collective head of State, consisting of one Bosniak, one Croat and one Serb. The election of Presidency has a

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<sup>1</sup> Gavrić, Saša, Damir Banović and Marina Barreiro, *The political system of Bosnia and Herzegovina. Institutions – actor - processes* (Sarajevo: Sarajevo Open Centre, 2013), 17-23.

territorial component, in fact the eligible voters in the Federation directly elect the Bosniak and the Croat members, while voters in the Republika Srpska vote for the Serb member. The powers of the Presidency speak combines the elements of a presidential and parliamentary democracy. In principle, the three members should make decisions based on consensus. However, they retain strong veto powers, meaning that if one member is overruled he may declare the decision destructive for the vital interest of the entity which he was elected and then block the procedure.

The Parliamentary Assembly is composed of two chambers:

- the House of Representatives: 42 delegates, directly elected, 2/3 by the Federation and 1/3 by the Republika Srpska;
- the House of Peoples: 15 delegates (5 Bosniaks, 5 Croats, 5 Serbs), indirectly elected by the National Assembly of the Republika Srpska (for the Serb delegates) and by the House of Peoples of the Federation (for the Bosniak and Croat delegates).

The main competences of the chambers are constitutional amendments, legislation, ratification of international treaties, approval and execution of the state budget and the approval and control of the Council of Ministers.

The Council of Ministers is characterized by an institutional distribution of power. It consists of one Chairman, nominated by the Presidency, and two Deputies. The three must represent the three constituent peoples. A part from them, the Council is composed of nine Ministers. The functions of the Chairman corresponds only slightly to the function of a Prime Minister. He has the task of coordinating the work among the government and other central state institutions, the entities and Brčko Districts, as well as the political duties with his deputies.

The institutions of Bosnia-Herzegovina clearly show how the territorial component meet the ethnic criteria, when it comes to its elections or appointments.

### *Federalism*

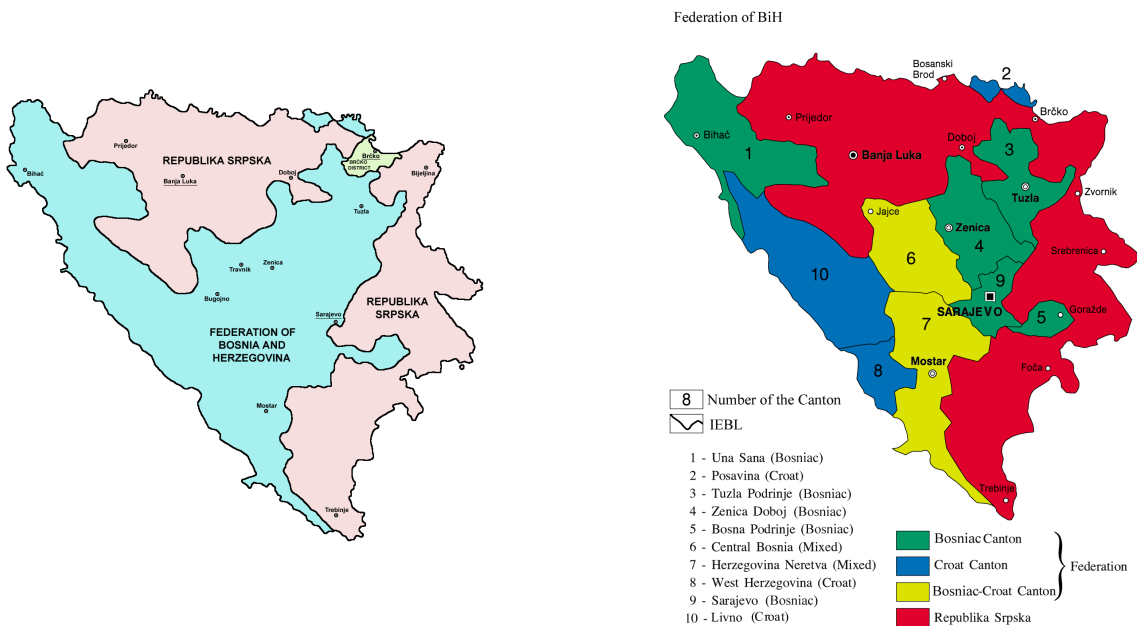
Bosnia-Herzegovina may be defined a “complex federalism”, as some authors argue that the state structure is federal rather than confederal. Yet the entities has no right to secede from the central state. As a result of the developments during and after the war, the two “quasi-state” entities emerged, each having its own Constitution.

The Federation's Constitution (1994) is of a consociational nature and designs the entity as territorially decentralized into ten cantons, each having its own legislative, executive, judicial branches. Its Parliament is also composed of two chambers: the House of Representatives and the House of Peoples. The President of the Federation and his/her deputies are indirectly elected by the two chambers and they must represent the three constituent peoples. The government must reflect the ethnic distribution of the Federation.

On the contrary, the Constitution of the Republika Srpska (1992) establishes a unitary republic. The Parliament is composed of two Chambers: the National Assembly and the Council of Peoples. The President is directly elected and his two Deputies must belong to the other ethnic groups. The government is more centralized than the Federation, since there is no vertical politics between the entity and its municipalities.

Brčko District has a special status, as it is not allocated to either of the entity and it functions as a demilitarized, independent district subject only to state control. The municipal statute (2008) lays down fewer power distribution arrangements than the state or entity level and it does not allow veto rights on national interest for the ethnic groups. The decision must be made by 3/5 majority in the District Assembly. The municipality has its own legislative, executive and judicial branches.

According to the State Constitution, the entities have relative constitutional autonomy and therefore extensive power when it comes to delegating responsibilities. The real power of the State of Bosnia-Herzegovina rests with the entities.<sup>2</sup>



<sup>2</sup> Gavrić, Saša, Damir Banović and Marina Barreiro, *The political system of Bosnia and Herzegovina. Institutions – actor - processes* (Sarajevo: Sarajevo Open Centre, 2013), 51.

### III. The judicial system

The judicial system of Bosnia-Herzegovina is based on the former Yugoslavian judicial system. Even though this system was often characterized as communist, authoritarian, totalitarian, etc., it needs to be taken into account that the legal doctrine, the legislation and the judiciary in the region had deep roots in Continental Europe history. After the Berlin Congress (1878) and the annexation by the Austro-Hungarian Empire (1908), Bosnia-Herzegovina was strongly influenced by the Austrian *Allgemeine Burgerliches Gesetzbuch*. These legal foundations were incorporated in the new legal system of the SFRY, except for those rules and principles found incompatible with the new communist constitutional and economic order.

Although the SFRY looked over one shoulder to European legal standards, its successor states have had no experience of a truly democratic legal system or independent judiciary. This discrepancy between relatively modern legislation and its implementation in real life was huge and often arbitrary<sup>3</sup>.

The Constitution of Bosnia-Herzegovina delegates the organization and the responsibilities for the judicial system to the entities and Brčko District.

In the Federation, the judicial system is structured in 31 Municipal Courts, ten Cantonal Courts, one Supreme Court. If the Municipal Courts may exercise jurisdiction over one or many municipalities, the competency of the Cantonal Courts correspond to the cantonal borders.

The Supreme Courts is the highest authority, while the Constitutional Court of the Federation is not counted as a judicial power, but it is mentioned as an organ of abstract normative control regarding laws and other judicial matters.

On the opposite side, the judicial power in the Republika Srpska is exercised by 20 General Courts, 5 District Courts and the Supreme Court. The General Courts are responsible for one or more municipalities, while several General Courts come under the authority of one of the District Courts. As in the Federation, the Supreme Courts is the highest authority and the Constitutional Court of the Republika Srpska deals with abstract normative control.

A separate judicial structure was introduced in the Statute and in the Law on the judicial system in Brčko District. The structure comprises a General Court and a Court of Appeal.

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<sup>3</sup> International Crisis Group (ICG), "Rule over Law: obstacles to the development of an independent judiciary in Bosnia and Herzegovina" Balkan Report No. 72 (5 July 1999): 25.

At the state-level, the situation is more complex. The Court of Bosnia-Herzegovina was established in 2007, having state-level jurisdiction and marking a moment of particular importance to the Bosnian-Herzegovinian judicial system. Its tasks are comprised of the protection of effective implementation of the central state's competencies and the protection of human rights and rule of law. However, this Court system has not yet fulfilled the prerequisites for a uniform central state judicial system. To do so, it would require the establishment of a Supreme Court of Bosnia-Herzegovina at the highest appeal board. Even if this idea was included in current reform discussion, there was no political majority to sustain this initiative, because this would mean losing part of the entities' power of jurisdiction and autonomy.

The Constitution of Bosnia-Herzegovina provides the basis for the state-level Constitutional Court, which strongly resembles Austrian and German legal tradition. It is comprised of nine members: four appointed by the House of Representatives of the Federation (two Bosniak and two Croats), two Serbs by the National Assembly of the Republika Srpska and three judges by the President of the European Court of Human Rights. It is a unique case of Constitutional Court with the presence of international members.

The Constitutional Court rules on controversies between the entities, the central state and the entities, the central state institutions. Concerning the access to the Constitutional Court, those eligible are every member of the Presidency, the Chairman of the Council of Ministries, the Chairmen and deputies of the two chambers of the Parliament, a quarter of the delegates in the chambers at the state-level and entity parliaments.

The establishment of the High Judicial and Prosecutorial Council (HJPC) in 2005 was pivotal for the judicial system in Bosnia. It is an independent and autonomous body, designed to ensure the independence, neutrality and professionalism of the judicial powers. It is composed of fifteen members: eleven appointed among fellow judges and prosecutors and four lay members appointed by the Council of Ministers, the Parliamentary Assembly and one each bar association in the entities. The Council is responsible for the election of judges and prosecutors at all levels and for their career, it rules on questions of judges' non-compliance with other functions and ensures continuous and adequate funding of the courts and the prosecution.

Judicial independence was the main issue in the post-war justice system. In fact, judges were exposed to strong political pressure and interference. Up until the establishment of the High Judicial and Prosecutorial Council, many issues threatened the degree of internal and external independence of judges. For instance, the appointment of judges and prosecutors used to be in the hands of the Ministers of

Justice (and so of political parties<sup>4</sup>) at the different levels; the funding and human resources for the judiciary were inadequate; the backlog created by the lack of judges and resources was significant; the professional training for judges and prosecutors was poor and so they were often young and inexperienced, easily subject to the intimidation of local politicians and warlords. All these factors encouraged the culture of lawlessness, as well as judicial corruption and conflict of interests, affecting the public opinion and the trust in the justice system.

In order to safeguard judicial independence, the appointment and dismissal of judges and their career advancement are centralized in the hand of the HJPC and the judges of the Court of Bosnia-Herzegovina and of the Courts in the Federation and the Republika Srpska are now assigned lifelong assignment. Moreover, the training is now provided by the Judicial and Prosecutorial Training Centers of the Entities. Another important element to guarantee the separation of power is significant financial independence. The High Judicial and Prosecutorial Council applies to the state-level Ministry of Justice for its annual budget, that must then be adopted by the Parliament. Recently, political parties tried to ‘politicize’ the appointment of the members of the Council, threatening the independence and impartiality of the body.

The post-war international influence has been relevant, since many international actors were engaged in the post-conflict reconstruction of the democratic life of the country, trying to strengthen the Rule of Law in Bosnia-Herzegovina. In particular, the actors were the Office of High Representative; the UN Mission in Bosnia-Herzegovina; OSCE; Council of Europe; European Commission. In particular, the European Commission has initiated the so-called Structured Dialogue on Justice, a platform of continuous dialogue between the European Union and Bosnia-Herzegovina on justice matters. This has proven to be a useful instrument, leading to some improvement.

According to the last EU Commission Report on Bosnia (2016), the measures that the judicial system still has to implement are: the adoption by the High Judicial and Prosecutorial Council of a set of guidelines on conflict of interest, drafting of integrity plans and disciplinary provisions; sanctions for breaching disciplinary and ethical rules, not yet much of a deterrent; safeguards from politically motivated threats on the judiciary; strengthening of judicial independence, including from political influence; better harmonization in criminal law matters; training upgrade; practice of alternative dispute resolution methods, such as mediation and judicial conciliation.

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<sup>4</sup> In Bosnia-Herzegovina, the main political parties are the Bosniak SDA (the Party of Democratic Action), the Serb SDS (Serbian Democratic Party), and the Croat HDZ (Croatian Democratic Union). All parties have strong ethnic-nationalistic features.

These recommendations prove that if it is true that from an institutional point of view judges enjoy a good degree of judicial independence, it does not necessarily mean that they will behave as independent and impartial, since political pressure still remains an strong issue to address. Moreover, in the country the media are controlled by local politicians, preventing them from being a useful instrument to support justice.

Finally, the access to justice is more and more guaranteed by NGOs present in the country providing free-aid to Bosnian citizens, but it is not guaranteed by the legislation.

#### **IV. Relationship between the political system and courts**

The two cases I am about to discuss present similarities and differences. On the one hand, both cases involve the political and institutional arrangements of the State. In fact, the decision made by the Constitutional Court of Bosnia-Herzegovina concern the equality among the constituent peoples in the entities, the one made by the European Court of Human Rights involves the relationship between constituent peoples and “Others”. On the other hand, the first case could be described as a “success”, since it brought about constitutional amendments in the entities, while the second case did not led to any implementation or fruitful discussion.

##### *The Constituent Peoples Case*

The Constituent People Case was a series of groundbreaking decisions made by the Constitutional Court of Bosnia-Herzegovina in 2000.

The initiative came from the NGO “Serbian Citizen Council”, calling attention to the discrimination of Serbs in the Federation and of Bosniaks and Croats in the Republika Srpska, since they were not listed as constituent peoples in the constitution of the respective entity. As former Bosniak member of the Presidency and then eligible to pose a request to the Constitutional Court, Alija Izetbegović filed a lawsuit of this matter.

The Court passed four individual judgments in January, February, July and August, declaring the several articles of the entity constitutions in breach of the state-level constitution. In this case, the Court stated that there was a sort of “conflict” between constitutions, placed in different positions of the hierarchy of legal sources. The decisions were passed by a simple majority, namely of the vote of the three



international and two Bosniak Constitutional judges. The Croat and Serb judges voted against the decisions. Thus, the judgment was only possible due to the fact that the Constitutional Court is one of the few institution that does not make decisions by consensus, nor does it have veto mechanisms in place.

It is significant to notice that the Constitutional Court had to answer affirmatively whether the preamble of the constitution, as such, can generally have normative character. The Court accepted the opinion that some lines of the preamble have normative content, which is of legal relevance. Based on such method of interpretation, the Constitutional Court derived three general normative principles: the principle of multi-ethnicity; the principle of collective equality of constituent peoples; the principle of prohibition of *de iure* and *de facto* discrimination.

The implementation of these decisions led to the inclusion of Serbs as constituent people in the Federation and of Bosniaks and Croats as constituent peoples in the Republika Srpska. The “Others” were also recognized as having rights to representation in parliaments and administrative bodies.

Through its decisions, the Court intended to conceive the state as multi-ethnic, trying to promote the integration and not the segregation of the ethnic groups. These decisions re-defined the principle according to which ethnicity was identified with territory. Therefore, the main consequence was that there are three constituent ethnic groups in the entire territory of Bosnia-Herzegovina, ending the discrimination of ethnic groups. Even though there was a general agreement on the how the decisions should be implemented, the political situation in the entities made impossible to revise their respective constitutions. In the end, it was necessary for the Office of the High Representative to intervene in order to enforce the amendments to the entities’ constitutions, imposing the implementation of the Mrakovica-Sarajevo Agreement in 2002.<sup>5</sup>

This case allows to reflect on the contradiction of the Dayton Peace Agreement. In fact, on the one hand it has established the ethnic separation to end the conflict, but on the other it has promoted an ethnically integrated society, through its provisions on the return of refugees and displaced people to their homes of origin.<sup>6</sup>

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<sup>5</sup> Gavrić, Saša, Damir Banović and Marina Barreiro, *The political system of Bosnia and Herzegovina. Institutions – actor - processes* (Sarajevo: Sarajevo Open Centre, 2013), 25-26.

<sup>6</sup> cfr. Article No. VII and Annex 7 of the Dayton Peace Agreement.

### *The Sejdić-Finci Case*

This relevant decision was made by the European Court of Human Rights in 2009. The applicants were Dervo Sejdić and Jakob Finci, citizens of Bosnia-Herzegovina, respectively belonging to the Roma and Jew minorities. In 2006, Mr. Finci wrote to the Central Electoral Commission about his intention to stand for election to the Presidency and the House of People of the Parliamentary Assembly. On January 2007, he received a written confirmation that he was ineligible to stand for such election because of his Jewish origin.

The applicants argued to the ECtHR that, despite possessing experience comparable to that of the highest elected officials, the Constitution of Bosnia-Herzegovina and the corresponding provisions of the Electoral Act of 2001 prevented them from campaigning for the Presidency and the House of Peoples solely on the ground of their ethnic origin. They relied on Article 3, 13 and 14 of the European Convention of Human Rights, Article 3 of Protocol No.1 and Article 1 of Protocol No. 12 of the Convention.

In this case, the Constitutional Court of Bosnia-Herzegovina had rejected the applicants' requests, since they argued that it would have meant to put in jeopardy the fragile social and political order designed by the Dayton Peace Agreement. On the contrary, the ECtHR recognized the recent progress of the country, but it agreed with the government that the time was not still ripe for a political system that abandoned the power-sharing mechanisms in place and would be a simple reflection of majority rule. However, as the Venice Commission had demonstrated in its opinion of 11 March 2005, there existed mechanisms for power-sharing that did not automatically lead to the total exclusion of representatives of the communities that were not among the constituent peoples. Moreover, joining the Council of Europe in 2002, Bosnia-Herzegovina undertook to review its electoral legislation within one year and it ratified the convention and the protocols thereto without reservations. Also, by ratifying the Stabilization and Association Agreement with the European Union in 2008, it had committed to amending electoral legislation regarding members of Bosnian-Herzegovinian Presidency and the delegates of the House of Peoples to ensure full compliance with the European Convention and the Council of Europe's post-accession commitments within two years.

Then, the ECtHR declared by majority that the provisions contested by the applicants were in breach of the European Convention of Human Rights, suggesting that the government should take appropriate measure to include the "Others" in the highest offices of the political life of Bosnia-Herzegovina. Nonetheless, in the dissenting

opinion Justice Bonello argued if it falls “within this Court’s remit to behave as the uninvited guest in peacekeeping multilateral exercises and treaties that have already been signed, ratified and executed”<sup>7</sup>, in some way siding with the opinion of the Constitutional Court of Bosnia-Herzegovina.

Lastly, I found interesting that the European Convention is declared by the Constitution of Bosnia-Herzegovina as integral part of the Constitution itself<sup>8</sup>, so in this case the ECtHR stated that these constitutional provisions breached the Convention, that should be directly applicable in Bosnia.

The international community, civil society organizations and political parties have made different proposals for the implementation of the Sejdić-Finci case, but none of them found the support of the Parliamentary Assembly. Today, the decision remains unimplemented as well as the reforms necessary for the integration of the “Others” in the political life of the country.

## V. Conclusion

Based on the analysis presented in the previous parts, we may provide some interpretations on the judiciary in Bosnia-Herzegovina.

First of all, we have already observed that the multi-level political architecture and its complexity generated a condition of judicial fragmentation. In my opinion, Bosnia is a case of both horizontal and vertical fragmentation, since it is either between the different levels (State, entities, Brčko District) or between the entity and the cantonal level within the Federation. Then, we may argue that it is a bureaucratic judiciary, since the system is strongly hierarchical and the main concern is towards the protection of individual (or, more precisely, ethnic) rights. The structure of judicial process seems to confirm this attitude, since judges are expected to act as mere arbiters, as in the adversarial process. This is due to the fact that the judicial fragmentation prevents the judiciary to develop a strong power over the political branches.

According to these remarks, I think it is not possible to talk about “judicialization of politics” as in other democratic countries, as the two phenomena characterizing this

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<sup>7</sup> ECtHR [GC], 22 December 2009, Case Nos. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia-Herzegovina*, 54-55.

<sup>8</sup> Cfr. Art. II.2 Constitution of Bosnia-Herzegovina (1995): “The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law”.

process are not present in Bosnia-Herzegovina. In fact, neither the extension of the power of the judiciary is such to transfer the decision-making rights from the legislature to the judicial branch, nor the judicial decision-making method is spreading outside the judicial provinces. Moreover, I found it difficult to distinguish between legal and non-legal model of judicial decision-making. Judges are mere arbiters and apply the law, but the composition of the courts is ethnically defined and the statutes have a strong ethnic component. In a country where ethnicity is at the basis of social and political life, from the appointments of public offices to the shape of political parties, judges, while applying the law, must necessarily take into consideration other than the law.

## **Bibliography**

Gavrić, Saša, Damir Banović and Marina Barreiro. *The political system of Bosnia and Herzegovina. Institutions – actor - processes*. Sarajevo: Sarajevo Open Centre, 2013.

Gozzi, Gustavo and Fabio Martelli, ed. *Guerre e minoranze*. Bologna: Il Mulino, 2004.

ECtHR [GC], 22 December 2009, Case Nos. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia-Herzegovina*.

European Commission, “Bosnia and Herzegovina 2011 Progress Report”, Commission Staff Working Paper (12 October 2011).

European Commission, “Bosnia and Herzegovina 2012 Progress Report”, Commission Staff Working Document (10 October 2012).

European Commission, “Bosnia and Herzegovina 2013 Progress Report”, Commission Staff Working Document (16 October 2013).

European Commission, “Bosnia and Herzegovina 2014 Progress Report”, Commission Staff Working Document (8 October 2014).

European Commission, “Bosnia and Herzegovina 2015 Report”, Commission Staff Working Document (10 November 2015).

European Commission, “Bosnia and Herzegovina 2016 Report”, Commission Staff Working Document (9 November 2016).

International Crisis Group (ICG), “Rule over Law: obstacles to the development of an independent judiciary in Bosnia and Herzegovina”, Balkan Report No. 72 (5 July 1999).

International Crisis Group (ICG), “Courting disaster: the misrule of law in Bosnia and Herzegovina”, Balkan report No. 127 (25 March 2002).

International Crisis Group (ICG), “Implementing Equality: the “constituent people” decision in Bosnia and Herzegovina”, Balkan Report No. 128 (16 April 2002).